FILE COPY

Office Supreme Court, U. S.
FILED
OCT 29 1960
JAMES R. BROWNING, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1960.

HENFIELD IMPORTERS, LTD., a Corporation, Petitioner, vs. HARRY BRANDT d b a University City House of Liquors et al., Respondents.	No. 458.
JAMES B. BEAM DISTILLING COMPANY, Petitioner, vs. HARRY BRANDT d b a University City House of Liquors et al., Respondents.	No. 475.
JULIUS WILE SONS & CO., INC., Petitioner, vs. HARRY BRANDT d b a University City House of Liquors et al., Respondents.	No. 497.

BRIEF OF RESPONDENTS.

J. L. LONDON,
1721-19 Mississippi Valley Building,
506 Olive Street,
St. Louis 1, Missouri,
MORTIMER ROSECAN,
706 Chestnut Street,
St. Louis 1, Missouri,
Counsel for Respondents.

INDEX.

	Page
Opinion Below	2
Jurisdiction	2
Question Presented	2
Statute and Rules Involved	3
Amended Statement	4
Appealability of Order of Judge Harper	5
Summary	7
Argument	8
Conclusion	14

CITATIONS.

Cases.

Austad v. U. S. Steel Corp. et al., 141 F. Supp. 437 (N. D. of Cal. 1956) 10, 11, 13

Harry Brandt d/b/a University City House of Liquors, et al. v. Renfield Importers, Ltd., a corp., et al., 278 F. 2d 904 (8th Cir. 4-27-60) 2

Cannon Mfg. Co. v. Cudahy Packing Co., 267 U. S. 333, 336 (1925) 10

Daggett v. Hunt, 199 F. 2d 152 (1952) 6

Eastman Kodak Co. v. Southern Photo Mtl. Co., 273 U. S. 359 (1927) 8, 9, 10, 11, 12, 13

Exhibitors Service, Inc. v. Abbey Rents, 135 Fed. Supp. 112 (W. D. Mo. 1955) 10

Green v. United States Chewing Gum Mfg. Co., 224 F. (2d) 369 (C. A. 5, 1955) 9, 10, 13

Kelly v. Great Atlantic & Pac. Tea Co., 86 F. (2d) 296 (4th Cir. 1936) 5, 6

Naifeh v. Ronson Art Metal Works, 111 F. Supp. 491 (W. D. Okla. 1953) 10

Santa Cruz Fruit Packing Co. v. Natl. Labor Relations Bd., 303 U. S. 453 ..... 8, 13

Sunbury Wire Rope Co. v. U. S. Steel Corp., 129 Fed. Supp. 425 (E. D. Pa. 1955) 9, 11, 13

U. S. v. National City Lines, Inc., 334 U. S. 573 11

U. S. v. Scophony Corp., 333 U. S. 795 (1948) 8, 9, 10, 12, 13, 14

Statutes and Rules.

15 U. S. C., Sec. 22 (Sec. 12, Clayton Act) 2, 3, 4, 7, 8, 11, 13

28 U. S. C., Sec. 1254 (1) 2

R. S. Mo., Secs. 311.050, 311.060 (6), 311.080 (5) 3, 8

Federal Rules for Civil Procedure:

Rule 21 6

Rule 41 5

Rule 54 (b) 15

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1960.

RENFIELD IMPORTERS, LTD., a Corporation, Petitioner, vs. HARRY BRANDT d/b/a University City House of Liquors et al., Respondents.	No. 458.
JAMES B. BEAM DISTILLING COMPANY, Petitioner, vs. HARRY BRANDT d/b/a University City House of Liquors et al., Respondents.	No. 475.
JULIUS WILE SONS & CO., INC., Petitioner, vs. HARRY BRANDT d/b/a University City House of Liquors et al., Respondents.	No. 497.

BRIEF OF RESPONDENTS.

Respondents respectfully pray the Court to deny the petitions for certiorari filed by the above petitioners for the reasons hereinafter set out.

OPINION BELOW.

In the interests of brevity, the Court is referred to the opinion of the United States Court of Appeals for the Eighth Circuit in this cause which is reported at **278 F. (2d) 904**, and appears at pages 15-30 in the petition for certiorari filed by Renfield Importers, Ltd., in this cause, and pages 17-32 in the petition of James B. Beam Distilling Co., and pages 15-30 in the petition of Julius Wile Sons Co., Inc.

JURISDICTION.

The respondents contend that there is no conflict between the decision of the United States Court of Appeals for the Eighth Circuit and any other Court of Appeals, and therefore there is no jurisdiction in this Court under **28 U. S. C. 1254 (1)**, as contended by petitioners.

QUESTION PRESENTED.

While the petitioner James B. Beam Distilling Company alone has undertaken to inject the question of the jurisdiction of the Court of Appeals (p. 17, petition of Renfield), it is obvious, as stated by the Court of Appeals, without merit. This will be briefly discussed hereinafter.

The question presented for review is not as stated in the form of conclusions by the petitioners, that the products were sold in the district involved, by wholly independent wholesalers, but whether under the venue provision (Section 12) of the Clayton Act (**15 U. S. C. A., Section 22**), corporations are **transacting business** in a judicial district so as to subject them to suit there when, as found by the Court of Appeals in its opinion (pages 25-28 of the petition for certiorari of Renfield Importers,

Ltd.): (1) the petitioners have taken out Missouri liquor licenses for foreign corporations as provided by **Sections 311.050, 311.060 and 311.180, R. S. Mo. 1949**; (2) where the corporations have each selected two licensed Missouri wholesale liquor dealers to distribute all of their liquor brands shipped into the district, and where the relationships between the distillers and the distributors are close, intimate and of long standing, and are much more than mere isolated bargains of sale; (3) where the distillers regularly shipped and have done so for years, large amounts of their products to these distributors under a systematic, continuous operation, and where there is a continuity of conduct and relationship between the suppliers of the products and the distributors, showing cooperation and participation of both in transacting business in the area in the district in question; (4) where the acts complained of were participated in jointly by the suppliers and by the distributors in this district. (See Court of Appeals opinion, page 30 of the petition for certiorari of Renfield Importers, Ltd.)

STATUTE INVOLVED.

The statute involved is Section 12 of the Clayton Act, **15 U. S. C., Section 22**, which provides:

> Any suit, action or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant or wherever it may be found.

AMENDED STATEMENT.

The facts of the case are accurately and carefully set out in the opinion of the Court of Appeals (pages 15-30 of the petition for certiorari of Renfield Importers, Ltd.), and for the sake of brevity are not here repeated, but are adopted as the statement of the respondents.

It is contended by Renfield Importers, Ltd. (page 7 of its petition for certiorari) that the Court of Appeals overlooked the requirement of Section 12 of the Clayton Act that the defendant corporation must be transacting business in the district. Counsel are in error in so contending, as a reading of the opinion of the Court of Appeals will quickly demonstrate. The Court of Appeals found and set out in its opinion that the petitioners in question **were transacting business in the district in large volume** (Emphasis ours) (p. 28, Petition of Renfield).

Renfield in 1956 sold $1,580,818.60 of its products to its distributors in this district; in 1957 it sold $1,313,947.98 of its products to these distributors in this district, namely: Conrad, Inc., and Paramount Liquor Company, Inc. It also sold its products to state liquor control commissions, and to airlines, railroads and other common carriers. (R. 34)

In 1957 James B. Beam Distilling Company sold $146,000.00 (R. 44) worth of its products to its distributors in this district. It employs a detail man who lives in this district but has no office. Its advertising in this district is prepared in Chicago (R. 44).

The Court of Appeals found that advertising is an important factor in the nationwide sales of the products of the petitioners. (Page 28 of petition for certiorari by Renfield Importers, Ltd.)

In 1957 Julius Wile Sons & Co., Inc., sold $142,000.00 (R. 28) of its products in this district. It has one employe in this District. He visits distributors and retailers and promotes good will. (R. 22-23).

The Court of Appeals found and held that the petitioners selected "sole and exclusive distributors who apparently perform for the appellees every function of distributing appellees' products that agents hired and paid for the purpose could accomplish." (Page 27 of petition for certiorari by Renfield Importers, Ltd.)

APPEALABILITY OF ORDER OF JUDGE HARPER.

Petitioner Beam is the only one of the three petitioners who raises any point as to the appealability of the order of Judge Harper, the District Judge.

Obviously, the plaintiffs had the right to dismiss as to any defendant they saw fit, even without an order of court, under Rule 41 of the Rules of Federal Procedure, since no answer or motion for summary judgment had been filed by any of the three petitioners (Rule 41 set out page 48 petition of James B. Beam Distilling Company). But nevertheless, the plaintiffs first obtained leave of court to dismiss as to all the defendants other than the three petitioners here involved (Supplemental Record No. 16359, page 4), leaving only the orders or final judgments as to the three petitioners (pages 4-6, Supplemental Record No. 16359).

Cases cited by Beam are not in point.

The following cases relied on by Beam do not at all support its contention.

Kelly v. Great Atlantic & Pacific Tea Co., 86 F. (2) 296, 4 C. C. A. 1936, was a case where the Federal Court re-

fused to remand the case and the plaintiff took a voluntary nonsuit. He appealed from the judgment of his voluntary nonsuit. There is no such situation in the case at bar. The plaintiffs have not appealed from their voluntary action. They appealed from the judgment of the Court dismissing the three petitioners over the protest of plaintiffs. This judgment of dismissal in the case at bar was rendered without the consent of the respondents and over their objection. The Court in the Kelly case, l. c. 296-297, points out that the order refusing to remand did not determine the case. Furthermore the Court points out that an appeal does lie from an involuntary nonsuit, l. c. 296-297.

The case of **Daggett et al. v. Hunt**, 199 Fed. 2nd 152, is likewise a case where the Court refused to remand (93 F. Supp. 426) and the Court of Appeals followed the Kelly case.

Petitioner, James B. Beam Distilling Co., then tells this Court (page 9, Beam Petition), that the decision cannot be reconciled with the case of Francisco v. Chicago and A. R. Co., 149 Fed. 354. Instead of supporting the petitioner, the case is squarely against the petitioner's position. Where a judgment is rendered on the motion of defendants (petitioners here) and over the objection and protest it is reviewable on appeal, l. c. 355, citing cases. The appeal in the case at bar is not from any voluntary action on the part of the respondents (plaintiffs) but from the action of the Court in sustaining the motions of the three petitioners to dismiss. These three orders were all that were left in the case and the appeals taken were only from the three orders dismissing the three petitioners.

The Court will recall that **Rule 21 of the Federal Rules of Procedure** provides that "Parties may be dropped or added by order of the Court on motion of any party or of its own initiative at any stage of the action and on such

terms as are just. Any claim against a party may be severed and proceeded with separately."

Obviously, there is no basis whatsoever for Beam's contention. The other two petitioners do not even join in such an absurd claim.

SUMMARY.

1. Each of the petitioners is transacting business in the Eastern Judicial District of Missouri within the meaning of **15 U. S. C. A., Section 22**; Section 12 of the Clayton Act.

2. Under the Anti-Trust laws a corporation is engaged in transacting business for the purpose of venue although it is not present by agent carrying on the business, if in fact, in the ordinary and usual sense, it transacts business therein of any substantial character.

3. Usually the place where title passes in interstate commerce shipments is immaterial where substantial business is transacted within a judicial district, even though it is transacted by agents who do not reside in the District, and even though the company has no office, telephone or representative in the District, nor is the amount of business measured by the percentage of business done in the District as compared to the total amount of business done by the corporation.

4. A foreign corporation cannot come into a district, perpetrate there the injuries outlawed and then retreat to its headquarters to defeat or delay the retribution due.

ARGUMENT.

There is no valid reason for granting the writ.

While the facts as to the three petitioners differ somewhat, nevertheless, the contacts of the three are basically the same, and the rule of law governing venue is applicable to all three of them. All of them have out-of-state liquor licenses issued by the State of Missouri pursuant to **Sections 311.050, 311.060 and 311.180, R. S. Mo. 1949.**

The purpose of **Sec. 22 of Title 15, U. S. C. A.** was to broaden the venue statute and to prevent corporations from transacting business illegally in a district in violation of the Anti-Trust laws, and then evading the penalties of their transactions. The leading case is **Eastman Kodak Co. v. Southern Photo Material Co.**, 273 U. S. 359, where this Court points out the amendment that was made by Paragraph 12 of the Clayton Act, and points out that a corporation is engaged in "transacting business" for the purpose of venue although it is not present by agents carrying on the business, if in fact, in the ordinary and usual sense it transacts business therein of any substantial character (l. c. 373).

This rule was followed in the case of **United States v. Scophony Corp.**, 333 U. S. 795, where this Court again points out the difference between "doing business" and "transacting business", stating that the words "transacting business" were given a much broader meaning for establishing venue than the concept of "carrying on business" denoted by "found" under the pre-existing statute and decisions (l. c. 807).

In the case of **Santa Cruz Fruit Packing Co. v. National Labor Relations Board**, 303 U. S. 453, this Court held that sales to purchasers in another state are not withdrawn

from federal control because the goods are billed f. o. b. at stated points within the state of origin, for transportation (l. c. 463).

A case that is squarely in point, and is cited by the Court of Appeals in its opinion (page 28 of petition for certiorari by Renfield Importers, Ltd.), is **Green v. United States Chewing Gum Mfg. Co.**, 224 F. 2d 369, a decision of the 5th Circuit. This case clearly and correctly sets out the rule, and follows the **Eastman Kodak Company** case and the **Scophony Corp.** case (supra). The Court in the Green case points out that the question of whether sales are substantial and result in the transaction of business within the judicial district is to be determined from the point of view of an average business man, **and not by comparison with gross business in the corporation** (Emphasis ours); and the Court also points out that a sale is never complete until delivery is made since it is the delivery which entitles the manufacturer to money. The business was transacted by mail.

The Green case refers with approval to **Sunbury Wire Rope Co. v. United States Steel Corp.**, 129 F. Supp. 425, where a Michigan corporation delivered almost $600,000.00 worth of steel into the Eastern District of Pennsylvania within less than two years. It had never registered to do business in Pennsylvania and never had an officer or resident salesman in Pennsylvania. It had no telephone listing, had no bank account, and had done no local advertising in Pennsylvania. The Court points out that the term "delivery" is not used in the same technical sense as it is used in the Uniform Sales Act or in the New Uniform Commercial Code; that it is used in its "practical everyday business or commercial concept", that the shipments were delivered into the Eastern District of Pennsylvania and those shipment deliveries constituted the transacting of business in that district.

In 1955, Supreme Court Justice Whitaker, who was then District Judge, decided the case of **Exhibitors Service, Inc. v. Abbey Rents**, 135 Fed. Supp. 112. He then pointed out (l. c. 113) that the question is not whether a defendant is "present" or is "found" in the district of suit, but whether judged in totality, it transacts therein, in the ordinary usual sense, any substantial business. Citing **Eastman Kodak Company v. Southern Photo Material Co.**, supra. Judge Whitaker cited several cases including the case of **Naifeh v. Ronson Art Metal Works**, 111 F. Supp. 491 (W. D. of Okla., 1953), which is cited by petitioner Renfield Importers, Ltd. on page 10 of its Petition herein.

The case of **Cannon Mfg. Co. v. Cudahy Packing Co.**, 267 U. S. 333, 336 (1925), relied upon by petitioner Renfield, is not in point. In that case a corporation marketed its products through a subsidiary corporation which it completely dominated. The subsidiary bought from the defendant and sold the products to dealers to be shipped directly from the defendant. The Court held that the mother corporation was not doing business in North Carolina. It was not a question of "transacting business" under the Anti-Trust laws.

The case of **Austad v. United States Steel Corp. et al.**, 141 F. Supp. 437, cited as supporting the petitioners, is directly against them in principle. In that case the defendant filed an affidavit asserting that 6 100 of 1% of the tonnage produced by it was sold in the District of California. This was all the Court had before it. That Court announced exactly the principle that we are contending for here. It quoted from the **Eastman Kodak case** with approval and also the **Scophony case**, and pointed out that the amount of orders sent into California was not before the Court. The Court discussed with approval the case of **Green v. United States Chewing Gum Mfg. Co.** (supra), and pointed out the difference between the presentation

of the facts in the **Sunbury case** and the presentation of the facts in the **Austad case.**

It is difficult to understand how the petitioner, Julius Wile Sons and Company can get any comfort out of the case of **United States v. National City Lines, Inc.**, 334 U. S. 573. This opinion, written by Mr. Justice Rutledge, considered only one point, that is, "whether the choice of forums given to the plaintiff by Section 12 is subject to qualification by judicial application of the doctrine of *forum non conveniens*" (l. c. 575). The Court expressly found that there is no such power in the district court. The court goes into the history of Section 12 of the Clayton Act and points out that the Scophony case reaffirmed the ruling in the Eastman Kodak Company case, and the Court expressly and specifically points out the broadening of the venue provision of the Sherman Act by Section 12 of the Clayton Act (15 U. S. C. A., Sec. 22). And this Court pointed out that it rejected the argument that the addition of "or transacts business" was no more than a redundant reformulation of "is found", but instead stated that the added words gave a broader and less technical meaning than "is found" (l. c. 579).

This Court also shows that the purpose was to relieve injured persons from the necessity of resorting for the redress of wrongs committed by a non-resident corporation, to a district, however distant, in which such non-resident corporation resides or may be "found" (l. c. 580), pointing out that often that was an insuperable obstacle.

This Court points out that Congress came to face the problem of making the nation's antitrust policy more effective through the Clayton Act's provisions (l. c. 581). The Court also brings out the fact that the basic aim of the change was to give the plaintiff the right to bring suit and have it tried in the district where the defendant had

committed violations of the Act and inflicted the forbidden injuries (l. c. 583).

Obviously, the National City Lines case lends no support to the position of the petitioners. None of the cases cited by the petitioners support the position of the petitioners on the facts in the case at bar.

Therefore, it is quite amusing in reading the petition for writ of certiorari filed by Julius Wile Sons & Co., Inc., to note the arguments that plaintiff should not have the right or the power to bring suit and force trial in suits in places far removed from the place where the company is incorporated or had its headquarters or carried on its business, and where it is difficult if not impossible for the injured parties to take their witnesses. These gargantuan corporations are crying with champagne tears in their eyes. However, the law governing these violations is too well settled for this petitioner to ask this Court to change the law as laid down by Congress, which is the effect of this petitioner's argument. This petitioner likewise incorrectly sets out that it ships its products to "one or two wholly independent wholesalers in the district" (page 2 of petition for writ of certiorari by Julius Wile Sons & Co., Inc.), and yet it admits that a percentage of its total annual sales were resold to Pioneer in the Eastern District of Missouri, showing that there are continuous transactions in this district (page 6, petition for writ of certiorari by Wile).

What we have heretofore said in connection with the petitions filed by Renfield Importers, Ltd., a corporation, and by James B. Beam Distilling Company, is equally applicable, of course, to Julius Wile Sons & Co., Inc.

The question involved has been definitely decided in the **Eastman Kodak case**, and also in the **Scophony case**, cited supra, and has been followed by the United States Court of Appeals for the 8th Circuit in its rulings in the

case at bar. And it is admitted (page 13 of petition for certiorari by Wile) that the decision of the court of appeals is supported by the cases of **Green v. United States Chewing Gum Mfg. Co.**, 224 F. 2d 369 (C. A. 5, 1955); **Sunbury Wire Rope Mfg. Co. v. United States Steel Corp.**, 129 F. Supp. 425 (E. D. Pa. 1955). There are no cases holding the other way, and so the Court of Appeals held in its finding (page 28 of petition for certiorari by Wile) that the amounts sold "reflect the systematic, continuous carrying on of the business and the continuity of conduct and relationship between the suppliers of the goods and the distributors of them indicates cooperation and participation of both in transacting business in the area", and (on page 29) that the position of this petitioner is contrary to the teaching of **Eastman Kodak Co. v. Southern Photo Materials Co.**, 273 U. S. 359, **Santa Cruz Fruit Packing Co. v. Labor Board**, 303 U. S. 453; **Green v. U. S. Chewing Gum Mfg. Co.**, 224 F. 2d 369; **Sunbury Wire Rope Mfg. Co. v. U. S. Steel Corporation**, 129 F. Supp. 425; **United States v. Scophony Corporation**, 333 U. S. 795, and other cases which the Court cites.

The Court of Appeals (pages 29 and 30 of Petition for Certiorari by Wile) sets out the cases relied on by petitioners and finds that none of them "appear to give substantial support to the position of appellees" and quotes from **Austad v. United States Steel Corporation**, relied upon by this petitioner, which Court, in turn, quotes from the Scophony case in which the Supreme Court commented as follows on the effect of 15 U. S. C. A., Sec. 22: "'A foreign corporation no longer could come to a district, perpetrate there the injuries outlawed, and then, by retreating or even without retreating to its headquarters defeat or delay the retribution due.'" 333 U. S. at page 808.

None of the cases cited by petitioners give substantial support to the position of the petitioners, and for the rea-

sons hereinabove stated, respondents submit that there is no occasion for this Court to review the opinion of the United States Court of Appeals for the 8th Circuit, in the case at bar.

CONCLUSION.

It is to be noted that the Court of Appeals in its opinion (page 29 of Petition for Certiorari by Renfield Importers, Ltd.) sets out numerous cases cited by the Petitioners, who were then appellees, and then finds that "None of these cases appear to give substantial support to the position of appellees."

The Court of Appeals in its opinion quotes from the **Scophony case** (supra), as follows:

> "A foreign corporation no longer could come into a district, perpetrate there the injuries outlawed, and then, by retreating or even without retreating to its headquarters defeat or delay the retribution due" **(333 U. S. at page 808)**.

As found by the Court of Appeals (page 30 of Petition for Certiorari by Renfield Importers, Ltd.), "the working arrangements between the licensed appellees and the licensed distributors they have selected to handle their liquor in St. Louis and vicinity is such that if so disposed they would have as good opportunity to 'perpetrate the injuries outlawed' as if they had agents working for them in the area".

It is noteworthy that the Honorable Roy W. Harper, United States District Judge, in his memorandum sets out that "The trials of Anti-Trust cases are lengthy and expensive, and the Court being of the opinion that the settling of the question of venue might well save much time for the Court, and expense, and that the order to be

entered by the Court on these motions should be so drawn that it would be appealable under Rule 54 (b) of the Federal Rules of Civil Procedure", and so he was holding **obviously for the purpose of getting the question of venue settled, that** (emphasis ours) "the contacts which movants have with this district are not sufficient to constitute the transaction of business within this district as required by Section 12 of the Clayton Act and the motions to dismiss for lack of venue will be sustained" (R. 50).

It is submitted that there is no merit to the position of the petitioners, there is no conflict, and therefore no basis for the granting of the writ of certiorari. This Court long ago settled the question now being raised by Petitioners against them.

Respectfully submitted,

J. L. LONDON,
1711-19 Mississippi Valley Building,
506 Olive Street,
St. Louis 1, Missouri,

MORTIMER ROSECAN,
706 Chestnut Street,
St. Louis 1, Missouri,
Counsel for Respondents.